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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 668

MANUFACTURERS TRUST COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The above named petitioner, by the undersigned, its attorneys, respectfully prays that a Writ of Certiorari to the Court of Claims of the United States of America may issue to review the judgment of that court made upon the 1st day of April, 1940, in the above mentioned cause.

Statement of Proceedings in Court Below.

This cause arose under the provisions of Section 800 of the Revenue Act of 1926, and Subdivision 10 of Schedule A of Title VIII of the Revenue Act of 1926, as added by Section 8 of the Silver Purchase Act of 1934 (48 Stat. 1179).

Petitioner, on January 29, 1936, duly filed with the Collector of Internal Revenue, Second District of New York, returns or memoranda for each of thirteen sales of silver bullion (Finding 24, R. 15), and stamp taxes aggregating $74,969.66 were paid the said Collector by petitioner on January 30, 1936, under protest (Finding 25, R. 15). Petitioner thereafter filed a claim for refund of $12,439.53 thereof, which claim was rejected in full by the Commissioner of Internal Revenue on February 6, 1936 (Finding 27, R. 16). Thereafter, petitioner filed amended returns (Finding 29, R. 16) and paid additional stamp taxes to the Collector of Internal Revenue of the Second District of New York, in the sum of $1,047.55, under protest (Finding 30, R. 16). Thereafter, petitioner filed a claim for refund of the said amount of $1,047.55, which claim was rejected in full by the Commissioner of Internal Revenue on June 11, 1936 (Finding 32, R. 16).

Petitioner thereupon brought suit against the United States of America, in the Court of Claims, to recover the sum of $13,487.08 erroneously and illegally withheld from it. The Court of Claims, in a decision rendered on the 1st day of April, 1940, denied petitioner's suit to recover said sum of $13,487.08, and dismissed its petition (R. 21).

On May 28, 1940, petitioner moved before the Court of Claims for a new trial or rehearing of the said action. This motion was overruled by the Court of Claims on October 7, 1940 (R. 21).

Opinion Below.

The opinion of the Court of Claims is reported in 32 F. Supp. 289. The order overruling petitioner's motion for a new trial or rehearing is not officially reported. See R. 21.

Jurisdiction.

The judgment of the Court of Claims was entered on April 1, 1940. The order of the Court of Claims overruling

the motion for a new trial was entered on October 7, 1940. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

Summary Statement of Matter Involved.

Petitioner claims that the tax should have been computed on the profit on the entire quantity of two million ounces of silver bullion, instead of on the profit on the first eleven hundred thousand ounces only. The remaining nine hundred thousand ounces were sold at a price that reduced the aggregate profit; and petitioner urges that the two million ounces constituted a single interest in silver bullion, and that its sale, though consummated in several instalments, constituted a single "transfer" of an interest in silver.

Petitioner's view is supported by certain findings of fact made by the Court of Claims.

Petitioner's purchase of silver bullion was an isolated investment of funds freed from German standstill credits, and with a view to recoupment of the loss sustained in the conversion of the foreign exchange (Findings 2, 3, 4, 5, 6, 7; R. 9-10).

The silver bullion was purchased in London in eight instalments from September 6, 1934, to October 5, 1934, a procedure made necessary by market conditions (Findings 7, 8; R. 10).

In December, 1935 various considerations led petitioner to decide to sell all of its silver bullion (Findings 10, 11, 12; R. 10-11). It was sold in instalments, as market conditions dictated, over the period from December 3, 1935, to January 6, 1936 (Findings 13, 14, 15, 16; R. 11-13).

The sales made from December 3 to December 17 were at prices above average cost; the remainder at prices below average cost (Finding 15; R. 13).

The method of selling in instalments was found to have been a reasonable and proper method of disposing of such a substantial quantity of silver bullion in the light of contemporaneous conditions in the London market (Findings 17, 18; R. 13-14).

It was also found that petitioner regarded the entire lot of silver bullion as a single investment, and that in selling in instalments it did not consider that it was separately transferring different interests in silver bullion (Finding 19; R. 14).

The Commissioner of Internal Revenue ruled, and the Court of Claims has decided, that the Silver Tax must be paid on the profit of each separate sale which resulted in a profit (as defined by the statute), thereby rejecting petitioner's claim that the correct basis for computation of the tax was the profit on the entire two million ounces of silver bullion (Findings 22, 23, 25, 27; R. 15-16).

A further issue is presented by the disallowance of an item of legal expense as a proper deduction under the Statute (Findings 28, 29, 30, 32; R. 16).

Principal Questions Presented.

1. Is a tax upon the profits from individual sales, without allowance of any losses from related sales during any reasonable accounting period, a valid tax on income under the 16th Amendment?

2. Is the silver tax validly applied as an income tax when it is imposed upon the profit from each separate sale of a series of related transactions without allowance of the loss from any related sales in such series?

3. Is a tax on the profit from each sale of silver bullion, without regard to whether the vendor is engaged in the fabrication, use, or sale of silver bullion as a business, a valid excise under Article I, Section 8 of the Constitution?

4. Did the Court of Claims correctly construe the Statute in applying it to the facts in this case so as to hold that there were several interests in silver separately transferred?

5. Was the item of legal expense correctly disallowed as a deduction in computing the tax?

Statutes and Regulations Involved.

The pertinent statutes and regulations will be found in the Appendix (*infra*, pp. 26-27).

Reasons for Granting Writ of Certiorari.

This case involves an important fundamental constitutional question of general applicability as to the extent of the power of Congress to impose a tax on the profit from isolated transactions, either as an "income" tax or as an excise. The tax as applied in this case by the Court of Claims would establish a basis for taxation which is inconsistent with and repugnant to elementary constitutional principles.

In addition, the Court of Claims has erred in construing the Silver Tax Law and applying it to the facts of this case. This Court, as the only reviewing tribunal, is asked to take jurisdiction in the interest of substantial justice.

I.

As Applied in This Case the Silver Tax is Not a Valid Tax on Income.

The word "income" as used in the 16th Amendment is a limitation upon the power of Congress. Neither the legislative nor judicial branches of the government may, by definition or construction, enlarge the scope of that power.

Income arises from liquidation of a capital investment only after the investment has been recouped. Inherent in the concept of income is the idea of a periodic accounting.

If Congress, in disregard of these considerations, seeks to tax that which is not true income, its action may not be justified under the 16th Amendment.

A tax on the "profit" derived from each individual sale, *i. e.*, the difference between cost of goods and selling price, without regard to other sales during a reasonable accounting period, is not a tax on income.

The concept of an accounting period for determination of income has never been distorted to the point of calling each sale such a period.

This Court has called the Silver Tax a "special income tax," *United States* v. *Hudson*, 299 U. S. 498. As applied to the facts in the *Hudson* case, the law functioned as a tax on the income from a special class of transactions. As applied by the Court of Claims in this case, the law cannot be so justified, as it has been made a tax on gross receipts. As such, it is a direct tax, and hence invalid because not apportioned, *Constitution, Article I, Section 2.*

II.

The Silver Tax Cannot Be Supported as an Excise in Its Application to This Case.

The Court of Claims said that the Silver Tax is valid as an excise, though it also described it as an income tax, following this Court's determination that it is a "special income tax" in the *Hudson* case. A tax on the profit from sales of personal property is a direct tax. Direct taxes and excises are mutually exclusive classifications under the Constitution. This tax cannot be both.

It is submitted that the Silver Tax, to the extent that it is properly applied, is an income tax, but that it cannot be supported at all as an excise. An excise is a tax upon the exercise of some privilege or function, other than the exercise of essential rights of ownership of property. A tax

on sales by a person engaged in the business of fabricating or buying and selling silver would be a valid excise. On the other hand, a tax on sales of silver by every owner thereof, as is the silver tax, is clearly a tax on ownership. "The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded." *Nicol* v. *Ames*, 173 U. S. 509, at 521.

If the Silver Tax had been an excise, the retroactive features approved in the *Hudson* case would have been invalid. The Government argued in that case that it was an income tax; but here it has sought to justify it as an excise, and the Court of Claims has called it both, ignoring the constitutional segregation of the two classes of tax.

III.

It Was Not Necessary for the Court of Claims to Apply the Statute as it Did to the Facts of This Case.

The Statute imposes the tax upon every transfer of an interest in silver bullion. The Court of Claims found that petitioner purchased the silver as a single investment with funds derived from a single source (Findings 5, 6, 7, 8, 19; R. 9-10, 13); that it was held for the purpose of recouping the loss sustained in the liquidation of German credits (Findings 5, 6; R. 9, 10); that it was regarded by petitioner as a single investment and that both in its purchase and sale petitioner considered that it was engaged in a single transaction (Finding 19; R. 14); and that it was sold in instalments as a reasonable and prudent method of marketing a large quantity of silver bullion in the light of existing conditions and the character of the London market (Findings 17, 18; R. 13-14).

On these facts there was no need or justification for concluding that the several instalments sold constituted sep-

arate interests, separately transferred. The Court's view that petitioner's subjective consideration of the singleness of the investment and its disposal was immaterial is untenable as a matter of law. Petitioner's view was not in conflict with, but was supported by, objective tests. Both from this point of view, and that of the purpose of the Statute, the court below should have held that there was but one interest in silver bullion transferred, and that the tax should have been computed upon the "profit" on that interest.

IV.

The Disallowance of the Deduction for Legal Expenses Was Improper as a Matter of Law. The Statute Permits Deduction of "Necessary Expenses Actually Incurred in Holding, Processing or Transporting" the Interest in Silver Bullion.

Petitioner urged that the legal expense was incurred in holding its interest. The Government urged that it was in the nature of an overhead item. The Court below held that there was nothing in the Statute authorizing its allowance.

It was agreed that the expense was incurred only in connection with the acquisition of the silver, and the legal problems arising in connection therewith, and the tax liability arising out of its sale (Finding 21; R. 14-15).

As a penal statute the law should have been liberally applied; and the item should have been allowed as a necessary expense incident to the holding of the silver.

Conclusion.

For the reasons above set forth, as elaborated in the brief annexed hereto, your petitioner respectfully prays that a Writ of Certiorari be issued under the seal of this

Court, directed to the Court of Claims, to the end that this cause may be reviewed and be determined by this Court, and that the judgment of the Court of Claims may be reversed, and that your petitioner, Manufacturers Trust Company, may have such other and further relief as this Court may deem proper in the premises.

Respectfully submitted,

BAER & MARKS,
By DONALD MARKS,
Attorneys for Petitioner.

Dated New York, N. Y., December 31, 1940.

Of Counsel:
DONALD MARKS.
JULIUS B. BAER.
DAVID STOCK.
MURRAY M. WEINSTEIN.

STATE OF NEW YORK,
County of New York, ss:

Donald Marks, being duly sworn, deposes and says: That he is a member of the firm of Baer & Marks, maintaining offices at 20 Exchange Place, Borough of Manhattan, City and State of New York; that he is a member of the bar of the Supreme Court of the United States and is an attorney for Manufacturers Trust Company, which was the plaintiff in the proceeding before the United States Court of Claims in the above entitled matter; that he makes this verification on behalf of Manufacturers Trust Company, as petitioner herein; that affiant has read the foregoing petition, was the attorney for said plaintiff Manufacturers Trust Company and has knowledge of this litigation; that the matters stated in said petition are true to the best of his knowledge, information and belief; that the foregoing petition is well

founded and entitled to the favorable consideration of this Court and that it is not interposed for the purpose of delay.

DONALD MARKS.

Subscribed and sworn to before me this 2nd day of January, 1941.

ROSE HOFFMAN,
Notary Public,
Kings County.

[SEAL.]

Kings Co. Clks. No. 404, Reg. No. 1073. Cert. Filed N. Y. Co. Clks. No. 367, Reg. No. 1H208. Commission expires March 30, 1941.